

Hinkle Metal Supply and United Steelworkers of America. Case 10–CA–24264

October 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On April 10, 1991, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's ruling, findings,² and conclusions and to adopt the recommended Order.

We agree with the judge's finding that the Respondent violated Section 8(a)(3) of the Act by its layoff and subsequent termination of employees Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons.³ The judge concluded that the General Counsel had made a *prima facie* showing that the union activity of these employees was the motivating factor in their selection for layoff and that the Respondent had failed to carry its burden under *Wright Line*⁴ of proving by a preponderance of the evidence that, in effecting a valid economic layoff,⁵ it would have laid off the six employees named above even in the absence of their protected conduct. The judge relied, *inter alia*, on demonstrated animus, threats of discharge, timing, the lack of credible reasons for the selection of these employees, and the change of their status from layoff to termination.

The Respondent asserts that, using the criteria established by its president, Hinkle, "to keep the best workers and to let the rest go," its managers and super-

visors developed a "firm" layoff list on June 2, 1989,⁶ of which employees would be laid off; and that it had no knowledge of any union organizing activity on the part of its employees until June 9,⁷ a week after it had selected the employees for the list. It contends, therefore, that because it established its list and effected its layoff without any prior knowledge of protected conduct, it has satisfied its burden under *Wright Line*, *supra*, of proving that the employees it laid off were selected for nondiscriminatory reasons. We find no merit in the Respondent's arguments for the following reasons.

1. The judge found that on June 2 Assistant Plant Manager Egington and Plant Manager Romano discussed the possibility of a layoff and who should be laid off, but that no layoff list was "finalized" until the following week, at which time Egington was on vacation. Egington did not testify with certainty that the layoff list used on June 9 was the same as that which he had discussed on June 2. He testified, "I think it was the same list." In any event, the judge found that the list used to lay off employees was completed during the week in which many 8(a)(1) violations occurred and there was a flurry of activity by the Respondent's supervisors to discover which employees were for the Union. Also, during this same week, a number of meetings were held between Romano and Supervisors Logan and McAvoy regarding whom to lay off. Further, it was not until 2:30 p.m. on June 9 that Romano gave the list of employees to office employee Gogan to prepare layoff notices, having earlier that week told her that Respondent "had to get rid of some people." Based on this sequence of events, we find that the judge implicitly discredited the Respondent's defense that a conclusive list existed on June 2. The Respondent never produced or put into evidence the alleged June 2 list. Therefore, we find that the Respondent has not presented any probative evidence to support its contention that it had established a firm layoff list by June 2 or that such a list even existed.

2. The Respondent's claim that it lacked knowledge of its employees' union activities prior to the layoff is equally unpersuasive. The discriminatees began discussing the need for a union in late 1988 and continued into early 1989. Employee Hall credibly testified that as early as March 1989, during a discussion with Romano regarding employee complaints, he mentioned that if Romano worked with several employees on their complaints it might keep a union out and that Romano replied that if the word "union" was mentioned he would be fired immediately. Hall also testified that on April 14, his supervisor, Logan, threatened discharge to anyone joining the Union, and on June 3 or 4 he was warned by Logan to disassociate himself

¹ No exceptions were filed with respect to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by engaging in the following conduct: interrogating employees concerning union activities; threatening employees with plant closure and/or discharge because of their support for the Union; creating the impression of surveillance; and promising an employee a new position if he reported the employees' union activities to management.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The judge found that the Respondent did not violate Sec. 8(a)(3) by its layoff and termination of employees Shelton Byrd and Clyde Townsend. No exceptions were filed with respect to that finding.

⁴ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

⁵ No exceptions were taken to the judge's finding that a layoff was economically justified.

⁶ All dates are 1989 unless otherwise specified.

⁷ The layoffs occurred on June 9 and 12.

from the union activities taking place or be immediately fired. Then on June 9, just before he was laid off, Hall, while outside Romano's office, overheard Logan telling Romano that the ring leaders in the Union were he, Byrd and Waldrop.

Employee Waldrop credibly testified that in early May, he was present when employees Simmons and Stephens informed Logan that the employees were going to meet with the Union. After this, Waldrop testified, Logan questioned him at least twice a week regarding what the employees were doing about the Union. On June 9, Logan told him, Simmons and Tolbert that he knew about the union meeting that was to be held that evening. At 3:45 p.m., just before he was laid off, Waldrop overheard Romano telling McAvoy and Logan that he wanted to know about everybody who was talking about a union.

Employee Simmons' credited testimony reveals that in early May, the employees began talking about the Union in the plant on their breaks and lunchtime. It was during this time that he and Stephens told Logan that the employees were going to meet with the Union. Further, on June 8, Logan, in response to Simmons' request to leave work early the next day in order to attend the union meeting, asked who was going to be there. Simmons named himself, Stephens, Byrd, Hines, Wise, and Waldrop. On June 9, at about 1 p.m., Logan told Simmons that if he went to the union meeting he would be fired and the company would shut the doors before allowing a union to come in. Finally, Simmons' wife, Donna, credibly testified that later that same evening when she saw Logan at a convenience store and asked him where her husband was, Logan told her that he was at the bowling alley attending a union meeting and threatened that if Simmons went union he would be fired.

Based on this chronology of events, we find that as early as the spring of 1989, the Respondent was aware that its employees were considering some sort of union involvement. Further, it is evident that early in the week of June 5, the Respondent knew that the employees had moved from mere discussions to active involvement with the Union. By that time, the Respondent knew which employees were spearheading the union effort and seized on the necessity to effect a lay-off to rid itself of its union adherents. Accordingly, we agree with the judge that although the Respondent had valid economic reasons for effecting a layoff, its motivating factor for the selection, layoff, and discharge of employees Hall, Waldrop, Wise, Hines, Stephens, and Simmons was their union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hinkle Metal Supply, Bir-

mingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Victor A. McLemore, Esq., and Keith R. Jewell, Esq., for the General Counsel.

R. David Proctor, Esq. and Richard I. Lehr, Esq. (Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held & Apolinsky), of Birmingham, Alabama, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on February 21 and 22, 1990, at Birmingham, Alabama. The hearing was held pursuant to a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board (the Board) on September 8, 1989, and is based on a charge filed on July 24, 1989, by the United Steelworkers of America (the Charging Party or the Union). The complaint alleges that Hinkle Metal Supply (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by creating an impression that the employees activities were under surveillance by telling employees that the Respondent knew they were on their way to attend a union meeting, by threatening its employees with discharge if they joined or engaged in activities on behalf of the Union, by threatening its employees with plant closure if they joined or engaged in activities on behalf of the Union, and by promising its employees increased wages if they refrained from joining, or engaging in activities on behalf of, the Union. The complaint also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by laying off and refusing to reinstate its employees Mike Hall, Andre Waldrop, Clyde Townsend, James H. Wise, Rhondell Stephens, Steven D. Hines, Robert Simmons, and Shelton Byrd because of their membership in and activities on behalf of the Union and because they engaged in protected concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. Respondent has by its answer filed on September 19, 1989, denied the commission of any violations of the Act.

On the entire record in this proceeding, including my observations of the witnesses who testified and due further consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. The Business of Respondent

The complaint alleges, Respondent admits, and I find that at all times material Respondent is and has been an Alabama corporation, with an office and place of business located at Birmingham, Alabama, where it is engaged in the manufacture of steel products, that during the past calendar year, a representative period of all times material, Respondent sold and shipped from its Alabama facilities goods valued in excess of \$50,000 directly for customers located outside the State of Alabama, and that Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. *The Labor Organization*

The complaint alleges, the Respondent admits, and I find that at all times material the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Respondent is a metal processing firm that performs services for its customers including United States Steel (U.S. Steel) which accounted for the major part of its business and other customers who buy steel which is processed to order by Respondent. Respondent also processes and "sells" internally to other branches of the Company. In late 1988 and early 1989 certain of the employees discussed joining a union, according to the testimony of employees Shelton Byrd, Andre Waldrop, and Mike Hall, all of whom I credit. Interest among the employees in joining a union increased in the spring of 1989 and a union official was contacted by employee James Wise on June 9 during lunch and a meeting was arranged with union official Clarence Brown for later that day at 4 or 5 p.m. at a bowling alley in a nearby town. The General Counsel presented testimony of acts committed by Respondent's supervisors and management of alleged interrogation, threats, giving the impression of surveillance of union activities, and a promise of a job made to an employee to report on the union activities of its employees in order to stem the union campaign. On Friday, June 9, employees Andre Waldrop and Mike Hall were laid off. The union meeting held on June 9 was attended by employees James Wise, Shelton Byrd, Steven Hines, Rhondell Stephens, Robert Simmons, and Kenneth Alderson. On Monday morning, June 12, employees James Wise, Clyde Townsend, Rhondell Stephens, Steven Hines, Shelton Byrd, and Robert Simmons were laid off. Most of the employees were subsequently terminated by letters issued by Respondent. None of the employees have been recalled to work. The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by the alleged interrogations of employees, giving the impression of surveillance, and threats of discharge and plant closure in retaliation for the employees' support of the Union, and a promise of an increase in wages to an employee if he reported the union activities of its employees and that the Respondent's knowledge of union activities and animus toward the Union and its supporters has thus been established and that Respondent violated Section 8(a)(3) and (1) of the Act by its layoff and subsequent termination of the above-named employees. The Respondent contends, however, that the layoffs were economic layoffs necessitated by a substantial loss of business and that the selection of these particular employees for layoff was motivated by business reasons and not by unlawful discriminatory reasons and that their subsequent terminations were occasioned by the request of certain of them for accrued vacation pay and Respondent's determination that it was necessary to terminate them in order for them to be eligible for accrued vacation pay. The Respondent further contends that assuming *arguendo* that a *prima facie* case has been established, it has presented sufficient evidence to show that the employees would have been laid off and terminated even in the absence of their engage-

ment in protected concerted activities on behalf of the Union and that the *prima facie* case has thus been rebutted.

Andre Waldrop testified as follows: He was hired in July 1988 and was a forklift driver and crane operator. His supervisor was Steven Hewlett until Hewlett quit and thereafter Doug Logan was in charge of the shipping and receiving department where he worked. There were discussions among all the permanent employees about a union in the latter part of April and first part of May 1989 but the union discussions really began when they were still at the old plant prior to the move to Respondent's existing facilities in 1988. He also talked to temporary employees about the Union. He talked about the Union to employees Robert Simmons, Mike Hall, Shelton Byrd, Steven Hines, James Wise, Rhondell Stephens, James Tolbert, and Eddie Dix. Waldrop recommended employee Clyde Townsend for employment with Respondent and trained him on the forklift. Waldrop testified that Townsend signed a union card on June 9 at Waldrop's house after Waldrop's layoff. In the first part of May, employees Simmons and Stephens told Supervisor Doug Logan that the employees were going to meet with a union representative. Commencing in mid-May 1989, Supervisor Logan approached him about twice a week and asked him what the employees were going to do about the Union. He told Logan the employees were still talking about it. On June 9 Logan approached Waldrop and Simmons and Tolbert as they were discussing the upcoming union meeting and told them he knew about the union meeting. Later that afternoon between 3:45 and 4 p.m., he was called upstairs to the office of Plant Manager Ben Romano. He heard Romano tell Supervisors Logan and Larry McAvoy that he wanted to know everybody that was talking about a union. When he entered the office he was laid off by Romano who told him it was necessary to lay him off because of lack of production as business had gone down. He was given a layoff slip¹ which he refused to sign. He noted that the premises were full of trucks (awaiting loading of Respondent's products). There had been no prior talk of layoffs and he had not observed any decrease in work nor had he heard of any future decrease in work. He was fourth in seniority out of the 13 to 15 employees in the shipping and receiving department. He had not received any complaints about his job performance. He had received a warning from Logan for leaving work early because he was sick. The Respondent worked a great deal of overtime and he had refused to work overtime on some occasions. He did not attend the union meeting of June 9. On cross-examination he acknowledged that in the June 9 conversation, Logan had told him and Simmons and Tolbert that he was not going to say anything about the Union and it was up to them to decide what to do about the Union. He also acknowledged having been late two or three times with possible complaints having been made by Respondent's management. On one occasion he had quit his job with Respondent because he was not given a relief man but had been called by Romano and put back to work the next day. He had also had a fight with James Tolbert but neither was discharged.

¹ Waldrop's layoff slip and those given to all the other employees laid off on June 9 and 12 were signed by Plant Manager Romano and stated that the employees would be given first consideration for rehire.

Employee James Wise testified as follows: He was employed on October 1, 1988, until his layoff of June 12, 1989. He was a cut-to-length helper or assistant operator on the first shift (this refers to the operation of a machine which cuts steel to length primarily for Respondent's internal use inside sales) by its other branches but also for some outside sales. The first-shift operator was Shelton Byrd. His immediate supervisor was Larry McAvoy. Around the first week of June he discussed with Shelton Byrd, Steve Hines, Robert Simmons, and, briefly with, Rhondell Stephens the possibility of contacting a union. He contacted Union Representative Clarence Brown at lunch on June 9 and scheduled a meeting with him and the employees for 4 or 5 p.m. that day. After the meeting was scheduled he told Byrd, Simmons, and Alderson and they told other employees about it. He attended the meeting as did Byrd, Hines, Stephens, Simmons, and Alderson as well as Union Representative Brown. On the next workday, Monday June 12, he returned to work and about 8:15 a.m. Assistant Plant Manager Steve Egington and Supervisor McAvoy came down with a handful of envelopes and handed one to him and he was laid off at that point. He had not heard of any layoffs or termination or observed any decrease in work prior to that time. He had talked to Egington about a raise the first week of June because he had not received his probationary completion raise. Egington told him he was happy with his work. He had also discussed this with McAvoy on two occasions. In February he was told to go to the wrapping area (which is staffed by temporary employees) but was returned to his permanent position a week and a half later. At the time of his layoff he asked for his vacation pay. He subsequently received a termination letter.

Robert Simmons testified as follows: He was employed by Respondent a year and a half prior to his layoff of June 12. Logan was his supervisor. In late May or early June he discussed a union with employees Stephens, Byrd, Hines, Wise, and Waldrop. He attended the union meeting of June 9. The day before the meeting he told Supervisor Logan the employees were going to have a union meeting on Friday (June 9) and he needed to get off work at 3:30 p.m. Logan asked him who was going to the meeting and he told him Stephens, Byrd, Hines, Wise, and Waldrop. Logan said if he went to the meeting he would be fired and that Hunter Hinkle (a part owner of Respondent) would shut the doors before he would let a union in. He rode to the bowling alley with Alderson and Supervisor McAvoy. McAvoy told him that if the employees attended the union meeting, they would be fired and that Hinkle would shut the doors before he would let a union in. Alderson did not get out of the car at the bowling alley. Logan had told him to drive his own truck when he came to work on Monday, June 12. When he arrived at work on June 12, Logan told him "it was all gonna go down today." Then Egington brought out the layoff slips. There was no mention of termination. This was the first he had heard of permanent employees being laid off and he had not been experiencing any decrease in work. There were six or seven employees with less seniority than he had. He had never received a written warning for job performance. On cross-examination he testified he is a long-time friend of Logan. Logan had mentioned an upcoming layoff of temporary employees and had told him he was attempting to keep him from being laid off. He does not recall Logan telling him on Fri-

day, June 9, that it looked like he would be laid off. He is positive that when he told Logan of union activity Logan asked who was involved. He had received written warnings for tardiness and for failing to show up for work. He denied that he told Assistant Plant Manager Egington that he had a problem getting to work on Saturdays because of late night partying. He does not remember coming to work on Saturday, June 10, for a few hours and then asking Logan if he could take off.

Donna Simmons (the wife of Robert Simmons) testified she and Logan went to high school together and are long-time friends. She saw Logan about 7 or 8 p.m. at a convenience store on June 9 and asked where her husband was. Logan told her that he was at the bowling alley having a union meeting and told her if Robert "tried to go union" he would be fired. She asked him about their health insurance because she was pregnant and Logan said it would be canceled if Robert were fired. I credit her testimony over that of Logan's denial, *infra*, of the threat of discharge.

Rhondell Stephens testified as follows: He was employed from October 1988 to June 19, 1989. On June 5 at lunch he and Simmons, Alderson, Wise, Byrd, Hines, and Waldrop discussed the Union. He attended the union meeting of June 9 and was driven to the bowling alley by Logan who told him he knew the reason the employees were going to the bowling alley. Logan told him three or four times during the ride that if he and the other employees signed union cards Respondent would close the plant down. He reported to work on June 12, worked about an hour, and then Egington and Logan handed him a layoff slip. There were five employees in his department below him in seniority. He had not received any complaints about his job performance and there had been no decrease in his work nor had he been notified of any future decrease in work. On cross-examination, he acknowledged he had to do public service work on Saturdays as a result of a conviction for public intoxication but testified he worked every weekend except when he was ill. Respondent's Exhibit 13 is his employment application and shows he was hired as a temporary employee. However, he was told by Supervisor Steve Hewlett that he was a permanent employee and received vacation. He received no complaints on the quality of his work.

Kenneth Alderson testified as follows: He was employed in May 1988 and worked until he was discharged on September 15, 1989. He worked as a bonder on the slitter machine. He attended the union meeting of June 9. However, he drove Simmons and McAvoy from work that day and dropped Simmons off at the bowling alley and then drove McAvoy home and then he came back to the meeting but did not tell McAvoy he was coming back to the meeting. During the ride, McAvoy said if the employees brought the Union in Respondent would shut the doors. He did not observe any decrease in work involving the period from May to September 1989. He continued to perform overtime on a regular basis every day. After the June 1989 layoff, one new employee was hired and other employees were transferred from the wrap area as trainees. (The wrap area of the shipping and receiving department has been regularly staffed by temporary employees.) On cross-examination, he acknowledged he filed an unfair labor practice charge following his termination by McAvoy after an argument with McAvoy. In his pretrial affidavit he had said he had not worked overtime for 6 to 7 months prior thereto. On redirect he testified that his argu-

ment with McAvoy was over McAvoy's insistence he work overtime, and he had been working overtime for some time.

Steve Hines testified as follows: He was employed in May 1988 until he was laid off on June 12, 1989. He was a machine operator on the CTL line. In late April or early May he talked with other employees (Wise, Stephens, Byrd, Simmons, Hall Reynolds, Sutherlin, and Alderson) about getting a union. He attended the June 9 union meeting. On June 12 he worked almost an hour and a half until he was approached by Assistant Plant Manager Egington who gave him a layoff slip and said he regretted the need to cut back and that Hines would be given first reconsideration for rehire. Egington did not mention termination. Hines had not experienced any decrease in work nor had he heard of any future decrease in work. He had not received any complaints about his performance nor any warnings for tardiness or attendance problems. His salary had progressed from \$4 to \$7.50 per hour. Two other employees in his department had less seniority than he did. He first learned of his "termination" when he returned to pick up his check. He has since returned to the plant and observed two new employees working (one in shipping and receiving and the other was sweeping up).

Michael Hall testified as follows: He was employed from January 1988 to June 7, 1989. He worked as a maintenance expediter and bought parts, picked them up, and helped maintenance employees install them. He had three supervisors, McAvoy, Egington, and Romano. In late March and mid-April he talked to Romano about complaints and desires on behalf of the employees when they were still at the old plant and asked Romano if he could rent fans to draw out the excessive amount of dust at the old plant. He also asked Romano if the Company could buy hard toed safety shoes for the employees and deduct the cost from the employees' paychecks. They moved to the new plant in the spring of 1989. He also asked Romano for more pay for the employees. Hall explained that in his job as an expediter he came in contact with many employees who knew he talked to Romano on a daily basis and they asked him to speak to Romano about various problems or requests. On March 3, 1989, he met with several employees (Byrd, Waldrop, Simmons, and Stephens) at his home and discussed "options of getting a union in." He signed a union card on May 21, 1989. On March 3, 1989, he mentioned to Romano that if he worked with several employees on their complaints, it might keep a union out. Romano said if the word "union" were mentioned he would be fired immediately. On June 3 or 4, 1989, Supervisor Logan told him that if he were involved in union activities that were taking place he would be immediately fired and it would be best if he were not involved with it. Hall also testified that on Thursday, June 8, 1989, about 2:30 p.m. he had been called to the office and was at the office door when he heard Logan tell Romano that the ringleaders in the union movement were Hall, Byrd, and Waldrop. When he went in the office, Romano told him that due to lack of orders and production they were making a major cutback and he was laid off. He had previously heard about layoffs on the first Monday in April 1989 when McAvoy told him things did not look good. Hall then told McAvoy he had an opportunity to go back to Williams Machine where he was employed at the time of the hearing and McAvoy told him this would be a good idea because sales orders had fallen

and as a result of this and problems with the slitter machine there was going to be a major cutback. Hall had received a number of verbal warnings but no written warnings. There was no mention of termination when he was laid off.

Hall testified that on June 12, 1989, Hunter Hinkle, Respondent's part owner called him at home and asked him what was going on at the plant and Hall told him the employees were trying to get a union in and that Romano fired everyone involved in it. Hinkle said he would have to get the facts from other people and just wanted some feedback from Hall. On June 15 or 16, 1989, Hall returned to the plant to pick up his paycheck and Romano asked to speak to him privately and said the union involvement had caught him by surprise and he was shocked Hall was involved in it and that possibly down the road he could get another job for Hall. Romano also said he did not think the Union could ever come in his company and they would either close the doors or make some adjustments so the Union would not get in. Romano also said if he had stayed on his team instead of the union involvement, "I would probably still have a job here and if he could find out what was going on with the Union he may have something in line for me down the road." He told Romano he could not do that to his friends and it would be best if he sought employment elsewhere. He asked if Waldrop could return because he knew he was suffering financially and Romano said no because if Waldrop (who is black) "stayed gone, the other blacks would stay in line." On cross-examination, Hall acknowledged that he had talked to other alleged discriminatees concerning withdrawing this case and expressed his reluctance to be testifying in the case.

Shelton Byrd testified as follows: He was employed on February 10, 1988, and worked until his layoff on June 12, 1989. He was a CTL operator on the first shift and served as a leadman. His supervisor was Larry McAvoy. He attended the union meeting on Friday, June 9, and had also been involved in union discussions in the spring at a bowling alley. He had numerous discussions on breaks, at lunch, and in the company parking lot about the Union with other employees, including Hines, Wise, Jim King, Nick Loggins. On Monday morning, June 12, layoff slips were passed out by Egington to him and other employees. There was no mention of termination. He had no prior word of the layoff of permanent employees. He was the most senior employee in the department. He did not observe any decrease in work but did not have enough space to operate the CTL as the wrap coils had been stored in the space near the CTL operation as wrap had priority. On the Thursday after the layoff, he returned to the plant and Romano asked him to come to his office and then asked him why we had to have this union meeting to begin with and Byrd told Romano there was concern about job security and a lack of confidence in management. On cross-examination, he denied ever having threatened to kill an employee or having referred to him as a "g—m faggot." On June 9 McAvoy asked if he wanted to go home early or help set up the new slitter machine. Byrd declined to help set up the machine, stating he had no experience on it. He denied telling McAvoy he wanted to be laid off. He acknowledged Hall had told him there was going to be a layoff, but stated that Hall was talking about his job, "not mine."

The Respondent presented evidence through the testimony of its witnesses to show that the layoffs were motivated by economic considerations and that the particular employees selected for layoff were selected because of valid business considerations. Assistant Plant Manager Steve Egington was initially called by the General Counsel and testified that U.S. Steel, the largest customer of Respondent, started to cut back on orders as early as December 1988, reducing export work which was primarily performed by temporary employees designated as wrappers who wrap the steel products for export. The shipping and receiving department, which includes both the temporary and permanent employees, was affected by this reduction. Egington also testified that Respondent had ordered a new slitter machine and incurred substantial expenses as a result of an accident that the truck delivering it was involved in, necessitating that it be sent back to the factory and that Respondent incurred additional expenses associated with the cost of installing the slitter machine.

With respect to the layoff of Hall, Egington testified Hall was laid off because the position was no longer justifiable. Hall worked as an assistant maintenance employee, drove a truck picking up parts, and did some procurement. Hinkle decided the procurement should be performed by an inside salesperson rather than by plant personnel and Hall no longer was ordering parts. Egington testified Waldrop was laid off for a variety of reasons such as attitude and temperament and unwillingness to work scheduled overtime hours. On one occasion, Waldrop had walked off the job and was terminated but was brought back as an employee. Additionally, a few weeks prior to his layoff Logan told Waldrop to stencil some coils for shipment that night and Waldrop said that Logan could not treat him that way and "there was a big row and shaking of fingers and raising of voices." At that time Egington came to the area to discharge Waldrop but Logan asked him not to do so and to let him handle the matter. Logan later told Egington the matter had been worked out. Egington testified Clyde Townsend was laid off as he had been initially hired because of forklift experience but that Townsend could not drive a forklift sufficiently well to maintain the required speeds. Egington testified that the layoff was discussed as early as April 1989 as they received word from a representative of U.S. Steel that the export business would dry up. The decision to lay employees off was made in mid-May. Egington testified Wise was laid off because of economic reasons and his attitude, noting that 2 weeks after his initial hire he "came that close to demanding a raise." Rhondell Stephens was selected for layoff because of his inability to work overtime for four weekends as a result of a conviction. Hines was laid off because his "performance had also dropped off." Simmons was laid off because of performance problems with "some materials he had cut wrong" and problems with attendance and tardiness. Simmons had made comments to him about being late because he was "out partying the night before." Byrd was selected for layoff because of his attitude and his temper. On one occasion the sales manager had come into the plant complaining about an order which Byrd had handled and Byrd told Egington "that the next time that he came out there that he was gonna whip his ass, or worse." In addition the cut to length orders had been reduced which was the department Byrd worked in. Egington acknowledged that subsequent to the layoff and termination of the alleged discriminatees Respondent transferred

certain temporary employees to permanent positions as helpers on the slitter machine. Respondent's Exhibit 2 is the timecard of Hall and shows that Egington signed Hall in at 7 a.m. and that Hall was clocked out at 3:05 p.m. Friday, June 9.

Hunter Hinkle who is a part owner of Respondent testified as follows: Respondent is a metal service center engaged in metal processing and selling of steel sheets. This involves taking a coil and either cutting it into sheets or slitting it into narrow strips for manufacturing. In 1989 U.S. Steel was the Respondent's largest customer and accounted for 80 percent or more of Respondent's volume. Respondent primarily wrapped coils of steel in protective cover for export by U.S. Steel. The work was not steady or predictable but subject to large orders which could be abruptly canceled. Respondent did a little slitting and cut-to-length for U.S. Steel but very little in 1989. Hinkle dealt with Bob Cary, U.S. Steel's manager of processing. In early spring of 1989 (approximately March), Cary told Hinkle that as a result of international monetary conditions, the export work would be coming to an end at least temporarily until conditions changed. Cary told Hinkle the work would be tapering off after May and there might not be any more after June or July. Cary recommended that Respondent get some other business. The work did begin to decline as Cary had predicted. The Respondent's financial statement for 1989 shows the volume of sales for metal wrap \$453,000 for March, \$548,00 for April, \$401,000 for May, \$485,000 for June, and a substantial drop in July. However, since the coils are wrapped a month ahead of time and U.S. Steel is not billed until they are shipped out, the sales volume for metal wrap for a given month actually reflects work that was performed in the prior month. Respondent also lost the business of Gulf States Steel, a large customer, for which Respondent performed cut-to-length work for one of Gulf's customers. Respondent also lost the business of Diversified Products, another large account. Respondent's financial statement shows a loss of cut-to-length and slitting sales volume. Whereas Respondent had averaged \$13,000 in the cut-to-length category over the prior 12 months, the sales volume in this category decreased from \$6000 in March to \$3000 each in April and May and to \$1500 in June. After he was told by Cary about the expected reduction in U.S. Steel work, he told Plant Manager Ben Romano and Assistant Plant Manager Steve Egington that as a result of the loss of their business it would be necessary to reduce the number of employees. He told them to keep the best workers and let the rest go and left the number of employees to be reduced for their determination. He specifically named Shelton Byrd to be let go. "He was a troublemaker. I could elaborate. He was fractious, bad temper, he cursed people out. His general appearance was slovenly. He was a bad example for other employees. I had three or four people tell me they smelled alcohol on his breath. They suspected him of taking drugs." He first became aware of union activity on Saturday morning, June 10 at 7 a.m. while on vacation when he received a telephone call from Romano who was very excited and told him "he had heard they were trying to unionize us." Romano asked him what to do because they had discussed reducing the employees weeks before. Romano told him "he had already cut part of them loose, and he had the list and stuff typed up and was ready to let them go Monday morning and he wanted to know what I wanted to

do.” “And I said, ‘Ben these reasons were for economic reasons and had nothing to do with the union, said, Go ahead and do what we planned.’” At that time he did not ask Romano for any names on the list, nor did Romano tell him who was on the list. He assumed Shelton Byrd was on the list. Prior to June 10 he had no idea there was any union activity at the plant. In response to a question as to whether he called Mike Hall after his termination to discuss union activity, he testified, “I don’t recall ever calling Mike Hall” about any subject at home at any time.

On cross-examination, Hinkle testified as follows: The decrease in U.S. Steel work affected shipping and receiving as well as the temporary wrapping employees. He is not aware that no temporary wrapping employees were laid off around June 9. The General Counsel stated in a question that the earliest layoff of temporary wrappers occurred around July 13, 1989, according to Respondent’s Exhibit 22. The cut-to-length sales volume reflected on the exhibit (R. Exh. 22) only reflects outside sales and does not reflect inside sales (to Respondent’s other branches). The exhibit also shows that in August the outside cut-to-length sales volume jumped up to \$5000 and in September to \$7000 as compared to March when it had been \$6549. In October it jumped to \$16,202 and in November it increased to \$55,964. This is typical of this business which fluctuates substantially. The inside sales figures had remained steady. Although they may fluctuate, they averaged \$150,000 a month and were not included on the exhibit. On redirect, Hinkle testified as follows: Diversified Products had been the largest slitting customer Respondent had. At the time of the layoff Respondent did very little slitting for U.S. Steel but as of the time of the hearing was doing a substantial amount of slitting for them. Respondent purchased a slitting machine and went after and obtained slitting business and the slitting sales volume increased toward the end of 1989. In June 1989, there was no slitting business. Slitting is much more technical than cut-to-length work. On recross-examination Hinkle acknowledged that in comparing the prior 10-month average of December 31, 1988, to the 10-month average of December 31, 1989, business was up.

The Respondent called Marsha Gogan who testified as follows: Gogan is employed by Respondent in office administration. Gogan corroborated Hinkle’s testimony concerning the large volume of export work for U.S. Steel in early 1989 requiring the hire of additional employees in the shipping and receiving department, the running of two shifts and weekend work. They were advised of decreases in projected work by U.S. Steel in March and the number of coils received and processed for export for U.S. Steel tapered off in the following months and there was a need for layoffs. The wrappers were all temporary workers and the shipping and receiving department was most affected. The cut-to-length line was also affected by the declining business as it is utilized in preparing the metal for export. The cut-to-length line was also affected because of a decrease in inside sales and because on-stock inventory had built up.

Gogan testified further to an incident involving employee Shelton Byrd who came into her office early one morning looking for an inside salesman who had not yet arrived. She testified he was about 6 to 8 feet from her and she could smell alcohol on his breath. Byrd was upset when she told him the salesman was not there yet. Byrd said, “He was going to kill the g—m faggot. And to tell him to come

out in the plant, he wanted to see him.” I credit Gogan that the incident occurred as she testified rather than Byrd’s denial thereof.

With respect to the layoff in June, Gogan testified that early in the workweek of June 5–9 Romano called her and said he needed to see her to process the paperwork as “we were going to have to get rid of some people.” She was given a list and asked to type up the letters. Neither Romano nor Hinkle nor any other supervisory person mentioned anything to her about union activity. Hinkle was not involved in the layoff process that week to her knowledge. On Friday, June 9, around 2:30 p.m. she was called to Romano’s office and given a list of employees for her to type up the layoff notices. Supervisors Doug Logan and Larry McAvoy were also in the office when she arrived. The layoff list contained the names of Mike Hall, Shelton Byrd, Steve Hines, James Wise, Ron Stephens, Andre Waldrop, Robert Simmons, Thomkins, and Clyde Townsend. She prepared the layoff notices on June 9 and completed most of them that date. As there was no word processing system in the office she had to type each notice separately. The employees leave at 3:30 p.m. and she had time to type up only the letters for Hall and Waldrop and requested that these two employees remain and they were given their layoff letters that day. She is positive Hall worked that day as she saw him on the premises. She then typed most of the other letters that afternoon. On Monday morning she came in and finished up the remaining letters and brought them to Romano and then discovered that Egington had taken her letter form and typed all the letters on a different piece of equipment (a word processor), so she threw her letters away. On Friday when she saw the list of employees to be laid off she recommended to Romano that Robert Simmons’ name be taken off the layoff list as she considered Simmons to do good work and she had confidence in him. Logan also spoke on Simmons’ behalf to Romano. Romano thanked her for her comments but made no commitment concerning Simmons. She has never heard Romano, Logan, Egington, McAvoy, or Hinkle discuss union activities or any employees’ participation in union activities. On cross-examination, Gogan testified that whereas Respondent had increased its office staff from two to three employees, to handle the U.S. Steel export business, it cut its office staff back from three to the current two employees as a result of the loss of the export business. She is aware that new employees were hired in March, April, and May but these were primarily temporary employees hired through a temporary service.

Respondent’s shipping and receiving supervisor, Douglas Logan, testified as follows: He had been employed by Respondent for 2-1/2 years and had been shipping and receiving supervisor for 10 months at the time of the hearing. He reports to Assistant Plant Manager Steve Egington. In late May he was informed in a supervisors’ and managers’ meeting that their “export project would be slacking off and we’d have to lay some people off.” He was not told how long the layoffs would last. “At that time, the export had started slacking off some.” He also observed that plant wide there was not as much work in the cut-to-length department. He was told that sometime at the end of June or July the wrap would be slowing down and would completely fade out. Plant Manager Ben Romano told him that some employees in his department would have to be laid off. He was not

given the number of employees to lay off but was told to observe his employees and keep the amount that he thought he needed to do the job. He decided he did not need to keep Clyde Townsend, Andre Waldrop, and Ron Stephens. He had hired Clyde Townsend as a forklift operator and he was unable to satisfactorily operate the forklift and so he moved him to other positions on the night shift and he did not work out there either. Supervisor Logan testified

Andre Waldrop was very rebellious towards me. He's always been. Almost every time I asked him to do something, he had something to say about it. Or he wanted to do it his way. And Andre wanted to be off a lot of times. And then when he wanted to work and I didn't need him, he wanted to complain about that also. Ron Stephens was hired as a warehouseman. He would do really just whatever I needed him to do one day, maybe unloading trucks, and the next day stenciling coils or whatever. And his particular position, some of the other employees that I did keep, could do his position also. And I just didn't need him.

Prior to June 9 he participated in discussions on Monday or Tuesday of that week with Larry McAvoy and Ben Romano. Steve Egington was on vacation that week. Romano had an employee list and called off some names of employees he thought should be laid off and they discussed them. Logan recommended the layoff of Clyde Townsend, Andre Waldrop, and Ron Stephens. There was no mention of union activity at the meeting. He made out the final list of who would be laid off in his department around noon on Friday, June 9. Romano told him Townsend, Waldrop, Stephens, and Robert Simmons would be laid off. He agreed with all the names except Simmons and told Romano, he regarded Simmons as a good employee who was needed as "he did his job very well, and I didn't think we should lay him off." There was no mention of union activity in the meeting. Later, Marsha Gogan came in during the meeting to obtain the list of names so she could type the layoff notices and when she saw Simmons' name on the list she also told Romano "she felt like we needed to keep Robert [Simmons]. That he did a good job for them as well as me, and was a good employee." "We argued for a few minutes, and he [Romano] finally looked at me and said, Well, you go downstairs and tell Robert that you saved his ass." Gogan then went down to type the letters and Logan told all the employees not to leave work because he did not know which notices Gogan had typed. Gogan said, "We called Mike Hall up and gave him his layoff slip, and then Andre Waldrop." There had been no mention of union activities at the meeting and he was unaware of any union activities at the time Hall and Waldrop were given their layoff notices. Prior to the layoffs of June 9 he had told employees Ron Stephens and Robert Simmons whom he regularly drove to work "that if the export slacked off like they said it was, we was gonna have to lay some people off." He first became aware of union activities at the plant about 3:30 p.m. on Friday, June 9 when Robert Simmons asked him to get off early as he "and a few other guys" were going to the bowling alley "to meet with some union officials." At the time of this discussion, Hall and Waldrop had already left. He permitted Simmons to leave early and Supervisor Larry McAvoy drove him to the bowling alley. He did not make any comments to Simmons

about the union meeting. At no time during Simmons' employment did he say anything to Simmons about being terminated for union activities. He cannot recall ever having said anything to Simmons about plant closing if the union came in, nor has he ever heard Hinkle or any member of management say the plant would close if the Union came in. On Friday, June 9, Ron Stephens also asked him if he could leave early as he was going to the bowling alley with Simmons. He told Stephens he could not let him leave early as there were more trucks coming in to unload and told him he would drop him off at the bowling alley which he did after they left the plant between 4:30 and 5 p.m. While still at the plant he spoke to Stephens and employee Henry Howell and told them he "knew they were going down to the bowling alley and they needed to think about what they were doing." He did not say anything to anyone else or tell any manager or supervisor what Simmons and Stephens had told him. At the time he left the plant that date he had not disclosed the discussions with Stephens and Simmons to any manager or supervisor. On the ride over to the bowling alley he told Stephens, "he needed to tell those guys they needed to think about what they were doing; they could handle this in a different manner, in a different way." He did not threaten Stephens with termination but did say "Hunter [Hinkle] will probably—if this plant goes union, he will probably close the plant down." He had never heard this from Hinkle but was expressing his own opinion because they "work 16 hours a day one day and the next day may not have anything to do. And we have to work a lot of weekends." When he dropped Stephens off at the bowling alley he saw Wise's car and Byrd's truck there. He then went to Supervisor McAvoy's house. McAvoy was on the phone with Romano when he arrived and was telling Roman "that he had dropped Robert [Simmons] off and they were meeting with the union." He told McAvoy that he had also dropped Stephens off at the bowling alley. Logan testified further that he saw Simmons' wife at a convenience store later that evening about 8:30 to 9 p.m. and that she inquired if he knew where Simmons was. He told her McAvoy had dropped Simmons off at the bowling alley and the employees were going to meet with some union officials. She then inquired as to what they were doing and he told her they were just going to meet with the union officials to see what they had to offer but that "they should be home by now." He also told Simmons' wife that Simmons "was scheduled to work the next morning [a Saturday] and if he didn't show up he was gonna be fired." The next morning he stopped by to pick Simmons up for work but he was not ready. Although starting time was 6 a.m. Simmons came in about 9 or 9:30 a.m. and asked whether he could clock in and Logan permitted him to do so. Simmons said his wife had told him if he did not come in Logan would fire him. He could have fired Simmons that day but Simmons was one of his best friends and he had just argued with Romano the day before about not getting rid of him and he knew he needed a job and wanted to keep him so he did not fire him. As of that Saturday he did not know Simmons was going to be laid off. After Simmons clocked in, he told Logan they had just met with the Union and did not know what they were going to do. Simmons also told him that he had gone out with employees Byrd and Hines on Friday night. After the layoff he discussed this case with Simmons at a football game and told him "Well, if any of the employ-

ees had a case, it would be you, Robert, because all the other guys were laid off before they even went to a union meeting. But I had already told you you wouldn't be laid off and then you came up laid off." He also discussed the case with employee Wise after the layoff when he took his paycheck to his home. Wise "said the main objective of going to the Union was to get Ben Romano." Logan responded, they could do what they wanted and he did not want to be involved in it. He never told Hall he would be fired for union activity. On cross-examination, Logan denied telling Simmons' wife on Friday, June 9, that Simmons ought not to get involved with the Union because he would lose his job. He never asked Waldrop "What's going on with this Union thing?" and never had any conversation with Waldrop concerning the Union.

Processing Manager Larry McAvoy testified as follows: He supervises the slitting and cut-to-length departments. In March 1989 he became aware that there would be layoffs because the export work for U.S. Steel was slowing down. They had bought a new slitter machine and it was not yet operating to capacity. Additionally the cut-to-length work had slowed down. Employees were to be laid off in the cut-to-length department but not in the slitter department. The slitter is more complicated to set up than the cut-to-length machine. A slitter is set up in thousandths whereas the cut-to-length is set up in inches. It is consequently easier to train a slitter operator to run a cut-to-length machine than it is to train a cut-to-length operator to run a slitter. There were three employees in the slitter department and two of them were operators and the other was an assistant operator who could run a shear (a blanking machine) and who was also a good maintenance worker. Romano told him three employees would need to be laid off in the cut-to-length department because of lack of work. He thought only two should be laid off. McAvoy, Romano, and Logan began discussing who should be on the layoff list on Monday, June 5. Steve Egington was on vacation that week. Romano told him Shelton Byrd, Steve Hines, and James Wise should be laid off. McAvoy wanted to keep Shelton Byrd. Shelton Byrd had asked him to lay him off a week prior to the actual layoff. Romano told him that Hinkle wanted to get rid of Byrd. Prior to that week Romano had told him to observe his employees and keep the best performers and most qualified. He chose Wise because Wise was unable to run a cut-to-length machine and complained all the time. Prior to the layoffs he had discussed the possibility of layoffs with Mike Hall and all the employees in his department. On June 9 he sent employees Byrd, Hines, and Wise home early because there was no work in their department. The remaining employee, Steve Sullivan was off that day. When he went home that evening he left with Elbert Alderson and Simmons and they dropped Simmons off at the bowling alley. Simmons told him that he was going there for a union meeting. He told Simmons "I think y'all are crazy, you'd better think about it Robert" but did not tell him he would be fired or that the plant would close down if the Union came in. Prior to this he had no knowledge of any union activity in the plant. He was not aware of who else was attending the union meeting. He went home and called Romano at home at 5:45 p.m. and asked him if he knew that some of the employees were talking with the Union. Romano became upset, cursed, and said "he couldn't believe that they was doing that, and he didn't see

where they had a reason to." Romano said he was going to call Hinkle but did not say anyone attending a union meeting would be fired or that the plant would close down. He does not recall Logan coming by his home and giving him a list of employees attending the union meeting while he was on the phone with Romano. He told Logan later that evening at a Little League baseball game what Simmons had told him about the union meeting. He was not aware of any union activities until Simmons told him of them on the evening of June 9 and had not discussed anything about unions with any employees prior to this. Alderson was subsequently discharged after an argument with McAvoy in which he cursed Logan and later Romano. He did not tell Alderson that if a union came in he would be fired or that the plant would close. He had not heard any other manager or supervisor or owner discussing union activities prior to June 9. To his knowledge no decision to terminate any of the employees in this case was motivated by participation in union activities with the possible exception of Simmons who had been taken off the layoff list on June 9 but was put back on the list on Monday, June 12.

On cross-examination, McAvoy acknowledged that prior to the June 9 layoff there were two operators and two helpers in the CTL department. Byrd was one operator and Wise was his helper. The other operator was Hines and Steve Sullivan was his helper. Three out of the four employees in the CTL department were laid off on June 9 leaving only assistant operator Steve Sullivan who became the new operator after this, Steve McCain who had been hired in April 1989 and had no experience as an assistant operator was transferred from the shipping and receiving department and became Sullivan's assistant. Three or 4 months later employee Joey Jordan became a new operator in the CTL department and Arthur Waldrop (the father of Andre Waldrop) who had been a temporary wrapper and who had no experience as an assistant operator was transferred to become an assistant operator in the CTL department. Subsequently other employees have been transferred from positions of temporary wrappers to positions in the slitter department.

Plant Manager Ben Romano testified as follows: The first indication he had of union activity was on Friday, June 9, at approximately 5:30 p.m. when McAvoy called him at home and told him "he had just observed Mr. Robert Simmons going into the bowling alley for a union meeting." He asked McAvoy who else was there and McAvoy said the only one he knew of was Simmons. He told McAvoy not to do anything and he would call Hinkle. He was unable to reach Hinkle until the next morning and told him he did not know what to do as this was the first time he has encountered union activity. He mentioned the pending layoff and asked Hinkle if he wanted him to hold off on it and Hinkle said, "No, that doesn't have anything to do with that. Go ahead and finish implementing that." Hinkle did not ask and he did not tell him who was involved. In response to a question as to whether the information from McAvoy in any way affected his actions regarding Simmons he testified "I think it could have been one of the factors. It probably was one of the factors as far as Robert Simmons goes." He denied that union activities played a part in his layoff decisions regarding the other employees on the layoff list. On cross-examination Romano, denied he had a meeting with Logan and McAvoy on June 8 in which Logan told him who the three

ringleaders of the union movement were. Respondent's Exhibit 21 shows the hire of Joey Jordan on June 24 as a slitter operator and Russell Dailey as a slitter assistant approximately May 30. A number of employees were laid off from shipping and receiving on June 12. There was a high turnover rate among wrappers. The first layoff of wrap employees occurred on July 13, 1989, according to Respondent's Exhibit 21.

Assistant Plant Manager Steve Egington testified as follows: He and Romano were present in Romano's office when Hall returned to the plant to pick up his check. At that time Hall said he thought union activity was the reason for his termination. Romano told Hall it had nothing to do with it and it was strictly a position cut in Hall's case, that it was a fact of life that cutbacks were going on and an unfortunate coincidence that they came together about the same time. Egington first became aware of union activities when he came back from vacation on the morning of June 12. He had initially become aware of the anticipated reduction in force in March or April when Hinkle discussed it with Romano and Egington and told them of the expected curtailment of export work from U.S. Steel. Romano told him that Hinkle wanted to consider job performance, dependability and an assessment of whether the position was necessary in evaluating which employees to retain. Seniority was not to be considered. Hinkle wanted "a small, trained staff of people that could be diversified rather than do one particular job." The layoff was caused by economic factors including the loss of the export program, reduced branch sales, and an excess of cut stock.

After the layoff Egington was informed that some of the employees had requested vacation pay. He checked with the central office and was informed that in a layoff the employees would not be entitled to vacation pay. Since it was anticipated that the layoff would be permanent, Respondent sent a second letter terminating the laid off employees in order for them to be entitled to their vacation pay.

Egington had input on every employee who was laid off. In addition to the layoff of employees, Hinkle had told them to look at every item of expense such as utilities, fuel and keeping Respondent's tractor-trailer on the road to avoid using an outside contractor. The only name initially brought up in the layoff discussion was Byrd. Hinkle had told them at the first mention of reductions that Byrd would be one of the employees to be laid off. Hall was laid off because his position was not justified as he had been used in part to drive a truck and purchase and pick up parts but Hinkle directed that purchasing should be done by someone inside the office rather than in the plant and the truck was moved to corporate headquarters. Egington was Hall's supervisor and initially fought Hall's layoff but ultimately recommended it because his position was not justified and he told Hall this. Employee James Deaver was specifically considered for layoff but was not laid off. Temporary employees come and go as the export wrap business does. He first learned that terminations had taken place on the morning of June 12 when Romano came into the plant, handed him the list, and asked him to finish the letters to the remaining employees on the list, which he did. At this time Romano also told him of the union activity. This was the first he had heard of any union activity. He questioned Romano about the circumstances and inquired as to what Hinkle said and Romano told him that

since it was already in place, to go ahead and complete the layoffs. When he saw the layoff list on June 12, he noted that Thomkins was no longer on there but assumed it was because he had already given his notice. To his knowledge union activity was not a factor in any of the terminations. On cross-examination Egington acknowledged that new employees were hired after this layoff.

On rebuttal by the General Counsel, Byrd testified he had not asked McAvoy to lay him off. Simmons testified he is positive that on the way to the bowling alley McAvoy told him that if the employees went to the meeting they would all be fired and Hinkle would shut the door. Rhondell Stephens testified he is positive that Logan told him three or four times on the way to the bowling alley that if he signed a union card the plant would be closed down. When he arrived at the bowling alley he recognized the vehicles of Byrd, Hines, and Alderson there.

B. Analysis

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by Supervisor Logan's interrogation of Waldrop concerning the union activities of the employees and by threats of discharge and plant closure issued by Supervisors Logan and McAvoy to its employees and by creating the impression of surveillance by Logan's telling employees that he knew of the union meeting at the bowling alley, and by Plant Manager Romano's solicitation of employee Hall's help in finding out what was going on with the union movement at the plant and his implied promise of an increase in wages if he did so. The General Counsel further relies on Hall's testimony that he heard Supervisor Logan tell Romano that Hall, Waldrop, and Byrd were the ringleaders of the union movement while he was waiting at the entrance to Romano's office as requested immediately prior to his layoff and Waldrop's that "he wanted to know everybody that was talking about a union," immediately prior to his layoff. The General Counsel also calls into question the legitimacy of the layoff and contends that the layoff was not economically motivated but rather was part of Respondent's overall scheme to rid itself of union adherents. The General Counsel points to the testimony of Respondent's witnesses that it had lost the major part of its business by the loss of export work for U.S. Steel and contends that this should have impacted on the temporary employees who perform wrap work to prepare the steel for export but who were not laid off until July 13, instead of impacting the permanent employees who were laid off on June 9 and 12. In this regard the General Counsel also contends in its brief that the failure of Respondent to timely supply it with its financial records until after the hearing left it unable to adequately review them to its detriment and urges that the Respondent's economic defense should thereby be rejected in its entirety.² The General Counsel also cites the circumstances and timing of the discharges shortly after the Respondent's, supervisor Logan, learned of the union meeting and after Respondent

² The Respondent's postbrief letter responding to this allegation is rejected and returned to Respondent as it is a posthearing reply brief which is not in conformance with the Board's Rules and Regulations. The posthearing allegation and motion by the General Counsel in its brief urging the rejection of Respondent's economic defense is also rejected.

became aware of the union campaign and notes that every employee who attended the union meeting with the exception of Alderson (who went to the meeting after taking Supervisor McAvoy home without telling McAvoy he was going to the meeting) was discharged, and including Simmons who had been taken off the layoff list on Friday, but who was put back on the layoff list and laid off the following Monday after it was learned he attended the union meeting. The General Counsel also cites the change of the layoff status of the employees to termination shortly thereafter. Based on the foregoing, the General Counsel contends that a *prima facie* case of violations of Section 8(a)(3) of the Act by the layoffs, terminations and refusals to reinstate has been established as Respondent had knowledge of union activity, and that its animus toward the union and its supporters has been established by its commission of the various violations of Section 8(a)(1) of the Act and the circumstances of the layoffs and subsequent terminations and refusals to reinstate although other employees were transferred and hired to replace the discharged employees. The General Counsel contends it has demonstrated that the layoffs were unlawfully motivated and violative of Section 8(a)(3) of the Act. The Respondent contends that the layoff was economically motivated as a result of its loss of its export business for U.S. Steel which impacted not only its temporary employees who were laid off in July but its shipping and receiving department in which the wrap work was performed and from which employees Waldrop, Townsend, Stephens, and Simmons were laid off. Respondent also contends it lost sales in its cut-to-length department as the result of its loss of other customers and a decrease in "inside sales" to its other branches of this type of work and that there was no work available in the cut-to-length department, thus necessitating the layoff of employees in this department from which Byrd, Hines, and Wise were selected for layoff. The Respondent contends that Hall's position was effectively eliminated as the purchasing work was removed from him and the truck he drove was moved to the corporate headquarters. Respondent contends that Hall was thus laid off because his position was no longer warranted. Respondent contends that employee Byrd was laid off at the direction of its owner because of his unsatisfactory behavior and that the other employees selected were laid off because of various shortcomings discussed in the statement of facts. Respondent contends that Simmons would have been laid off in any event because of his shortcomings in coming to work on time and his lateness on the Saturday before his termination although Plant Manager Romano concedes that Simmons engagement in union activities was a factor considered in his selection for layoff after he had originally been removed from the list and notwithstanding that Supervisor Logan permitted him to work on the Saturday prior to his discharge although he appeared at work late on that Saturday. Respondent further contends that the subsequent discharge of the employees was necessary to permit them to receive vacation pay which it contends would not be payable if they were merely on a layoff status. Respondent contends its replacement of at least some of the laid-off and terminated employees with transfers of inexperienced employees and the hire of new employees rather than recalling the laid-off and terminated employees was justified as they had been laid off and terminated because their job performance, at-

tendance and punctuality, and/or personal conduct were unsatisfactory.

I find that the General Counsel has established a *prima facie* case that each of the allegations of Section 8(a)(1) and (3) were committed by Respondent with the exception of employee Clyde Townsend's layoff. Initially I credit the testimony of each of the discriminatees³ who testified in this case, as well as employee Alderson. I found the testimony of these witnesses to be specific, consistent, and unwavering. Moreover, their demeanor on the stand was forthright and convincing. While I recognize there were some minor inconsistencies in their testimony, such as Hall's testimony in which I find he incorrectly identified June 7 rather than June 9 as the date of his layoff, I found that their testimony taken as a whole was consistent and corroborative. I further found no evidence that their testimony was in any way contrived or false although I note their tendency to put the most positive emphasis on their performance on the job. With respect to the layoff of employee Clyde Townsend I find the General Counsel failed to establish a *prima facie* case. Townsend did not testify and none of the witnesses identified him as a union supporter or having attended the union meeting except Waldrop who testified Townsend signed a union card at Waldrop's house on June 9 after Waldrop's layoff. Further I credit Logan's and Eginton's testimony that the reason for his layoff was his inability to satisfactorily drive the forklift truck. I do not credit the testimony of McAvoy and Logan denying the various acts of Section 8(a)(1) attributed to them nor Plant Manager Romano's denials concerning the promise of something down the line⁴ made to Hall notwithstanding the testimony of Eginton that he was present at all times when Hall returned to the plant. I thus conclude that Respondent violated Section 8(a)(1) of the Act by its interrogation of Waldrop, its threats of plant closure and/or discharge made to Hall, Wise, and Simmons and Alderson, and by its creation of the impression of surveillance of its employees and by its promise of a position down the road made to Hall by Romano.

With respect to the Respondent's contentions that the layoffs were economically motivated and that the selection of the employees was justified by business considerations, I find initially that Respondent has shown there was a downturn in its business caused by the loss of the export business of U.S. Steel and that this affected the shipping and receiving department. I credit the testimony of Respondent's witnesses that the layoff of the temporary wrap employees in July was consistent with the finishing up of the export business at that time. I also credit the un rebutted testimony of Respondent's owner Hinkle that Respondent lost two major customers affecting its cut-to-length work and the testimony of Respondent's witnesses that the cut-to-length work was substantially decreased as a result of a loss of outside sales. I also credit the testimony of Eginton that some of Hall's work had been diminished as a result of the removal of purchasing to the

³ This is with the exception of Byrd's denial of the comments made by him to Gogan concerning another employee. I credit Gogan in this regard as well as Hinkle and Respondent's witnesses Eginton and Romano and McAvoy that Hinkle ordered that Byrd be included in the layoff.

⁴ I find the implied promise of something down the line made by Romano to Hall was a promise of a job rather than an increase in wages as contended by the General Counsel.

office and the loss of a truck. However, I credit Hall's testimony that he personally was kept busy. I also credit the specific and convincing testimony of Hinkle that he had told Romano and Eginton to lay off employees and had specifically ordered them to lay off Byrd because of his personal behavior. Based on the foregoing, I conclude that the Respondent has demonstrated by the preponderance of the evidence that a layoff was economically justified and that Byrd would have been laid off even in the absence of his engagement in the union activities. However, with the exception of the layoff of employees Byrd and Townsend, I do not find that the Respondent has demonstrated by the preponderance of the evidence that the layoffs of the remaining employees would have occurred even in the absence of their protected activities. Although Respondent attempted to show that the layoff of each of the permanent employees was based on his performance, attendance or punctuality, or personal behavior, or in Hall's case a lack of need for the position and contributed to the decision to lay them off, I have specifically noted Eginton's testimony concerning his analysis of the reasons for the layoffs of each employee whom he indicated were the same employees he believed were to be laid off. However, Eginton was not at the plant during the week when the layoff list was finalized and during which much of the 8(a)(1) violations occurred. During this week there was a flurry of activity on the part of Respondent's supervisors to discover who the union advocates were and according to credited testimony of Waldrop that immediately prior to his layoff he heard Romano tell Supervisors Logan and McAvoy he wanted to know everyone who was talking about a union. Hall's testimony, which I have also credited, was that immediately prior to his layoff he heard Logan tell Romano that the ring-leaders in the union movement were Hall, Byrd, and Waldrop. Thus, the evidence clearly shows that the union activities of the employees were enmeshed with Respondent's management's consideration as to which employees were to be laid off. I am not convinced by the preponderance of the evidence that Respondent would have selected these particular employees for layoff in the absence of their engagement in protected activities. In this regard in addition to the timing and threats of retaliation which demonstrated that Respondent had notice of the union campaign and its supporters prior to the union meeting, I find significant the change in status of these employees from that of layoff to termination notwithstanding the vacation pay explanation of Eginton. I also find significant Respondent's transfer of temporary employees to fill the positions of the experienced laid off and terminated employees. In the case of Simmons I find that Respondent's plant manager, Romano, all but conceded that the layoff of Simmons was the result of his engagement in union activities. Romano did not contend that the layoff of Simmons was the result of his being late on the Saturday prior to his layoff and Supervisor Logan permitted him to work on that Saturday and testified he considered firing Simmons but decided against it.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board held that once the General Counsel has made a prima facie showing that the protected conduct was a motivating factor in the action taken against an employee by the employer, the burden then shifts to the employer to demonstrate that it would have taken the same ac-

tion even in the absence of the protected conduct. It is not sufficient for the employer to show that it also had a legitimate reason for the action but the employer must persuade that it would have taken the action even in the absence of the protected conduct by a preponderance of the evidence. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In the instant case I find that Respondent carried this burden only in the case of the discharge of employees Shelton Byrd and Clyde Townsend assuming arguendo that a prima facie case was established with respect to Townsend. I find Respondent failed to carry its burden with respect to the other employees. I thus conclude that the Respondent did not violate the Act by its layoff and termination of employees' Shelton Byrd and Clyde Townsend. I conclude the Respondent did violate Section 8(a)(3) of the Act by its layoff and termination of employees Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons.

CONCLUSIONS OF LAW

1. Respondent Hinkle Metal Supply is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Steelworkers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by its interrogation of employee Andre Waldrop.
4. Respondent violated Section 8(a)(1) of the Act by threats of plant closure and/or discharge issued to its employees James Wise, Kenneth Alderson, Robert Simmons, and Mike Hall.
5. Respondent violated Section 8(a)(1) of the Act by the creation of an impression of surveillance of the union activities of its employees by Supervisor Logan.
6. Respondent violated Section 8(a)(1) of the Act by its implied promise of a job to employee Mike Hall if he assisted in reporting to Respondent's manager on the union activities of its employees.
7. Respondent violated Section 8(a)(3) of the Act by its layoff and termination of employees Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons.
8. Respondent did not violate the Act by its layoff and termination of employees Clyde Townsend or Shelton Byrd.
9. The above-unfair labor practices in connection with the business of Respondent as set out above have the effect of burdening commerce and are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated the Act, it shall be ordered to cease and desist therefrom, and to take certain affirmative actions, including the posting of an appropriate notice, designed to effectuate the purposes of the Act. Respondent shall rescind its unlawful layoffs and discharges of its employees Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons and offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions and make them whole for all loss of pay and benefits, including seniority and other rights and privileges sus-

tained by them as a result of Respondent's unlawful discrimination against them. Backpay and benefits shall be with interest, as computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁵ Respondent shall also expunge its records of all references to the unlawful layoffs and discharges taken against the above-named employees and inform them in writing that this has been done and that such unlawful actions will not be used against them in any manner in the future. Respondent shall also preserve all necessary records for backpay and benefits and make them available to the Regional Director for Region 10 or his representatives.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Hinkle Metal Supply, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union activities and those of their fellow employees.

(b) Threatening its employees with plant closure and discharge because of their support for the Union.

(c) Creating the impression of surveillance of the union activities of its employees.

(d) Promising its employees jobs if they report the union activities of its employees to management.

(e) Laying off and discharging its employees Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons because of their engagement in union activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind its unlawful layoffs and discharges of its employees Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons and offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions and make them whole for all loss of wages and benefits with interest as set out in the remedy section and restore all rights and privileges including seniority to them.

(b) Expunge from its files any references to the unlawful actions taken against Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons and inform them in writing that this has been done and that these unlawful acts will not be used against them in any manner.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records

and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Birmingham, Alabama, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities and those of their fellow employees.

WE WILL NOT threaten our employees with plant closure and/or discharge because of their support of the union or engagement in union activities.

WE WILL NOT create the impression of surveillance by telling our employees we know of their union meetings or other concerted activities on behalf of the Union.

WE WILL NOT solicit our employees' assistance in reporting union activities of our employees with the promise of a job.

WE WILL NOT layoff or discharge our employees because of their engagement in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our unlawful layoffs and discharges of Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons and offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions and will make them whole for all loss of wages and benefits sus-

⁵Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tained by them because of our unlawful conduct, with interest, and will restore to them all rights and privileges previously enjoyed.

WE WILL expunge from our files any references to the unlawful layoffs and discharges of Mike Hall, Andre Waldrop, James H. Wise, Rhondell Stephens, Steven D. Hines, and Robert Simmons and WE WILL inform them in writing that this has been done and that the unlawful conduct will not be

used against them in any manner, because of their support of the Union or their engagement in other protected concerted activities.

Our employees have the right to join and support the United Steelworkers of America or to refrain from doing so.

HINKLE METAL SUPPLY